



## Kentucky Law Journal

Volume 24 | Issue 2

Article 6

1936

# Equity--Specific Performance. A Criticism of the Doctrine of Equitable Conversion

John Geyer

*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Contracts Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

### Recommended Citation

Geyer, John (1936) "Equity--Specific Performance. A Criticism of the Doctrine of Equitable Conversion," *Kentucky Law Journal*: Vol. 24 : Iss. 2 , Article 6.

Available at: <https://uknowledge.uky.edu/klj/vol24/iss2/6>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

## STUDENT NOTES

### EQUITY—SPECIFIC PERFORMANCE. A CRITICISM OF THE DOCTRINE OF EQUITABLE CONVERSION

In the recent case of *Berndt v. Lusher, et al.*,<sup>1</sup> a husband died intestate owning four parcels of land which descended to his widow. The widow entered into four contracts of sale to different purchasers each of whom made a down payment and entered into possession. The widow died intestate, and without issue, before the contracts were performed, leaving brothers and sisters as heirs. The widow's administrator collected what was due on the contracts. There was a balance still remaining due on two of the contracts, but no default in the stipulated payments had been made by any purchaser. A sister of the husband claims a one-half interest in the estate of the widow, by reason of a statute,<sup>2</sup> if the widow died in possession of the identical property which came to her from her husband. The administrator of the widow's estate brought suit to secure the direction and judgment of the court as to the distribution of the estate. *Held*, the real estate which the widow had received from her husband became converted into personalty by the execution of the contracts of purchase and taking possession thereunder by the various purchasers, and on her death the right thereto passed to her administrator to be distributed to her brothers and sisters as next of kin. The court said, "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land."

Substantially the same language has been used in the Kentucky cases dealing with this problem.<sup>3</sup>

This doctrine of equitable conversion by contract was stated by Jessel, M. R., in *Lysaght v. Edwards*,<sup>4</sup> as follows, "Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate

---

<sup>1</sup> 40 Ohio App. 172, 173 N. E. 14 (1931).

<sup>2</sup> Ohio Gen. Code, Sec. 8577.

<sup>3</sup> *Loughborough's Executors v. Loughborough's Devisee*, 53 Ky. (14 B. Mon.) 441 (1854); *Collins v. Champ's Heirs*, 54 Ky. (15 B. Mon.) 118 (1854).

<sup>4</sup> L. R. 2 Ch. D. 499, 507 (1876).

of the vendee; and therefore all these cases of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity."

The basis for this different effect of a contract in equity is stated as follows: "The doctrine of equitable conversion rests on the presumed intention of the owner of the property and on the maxim that equity regards as done what ought to be done."<sup>5</sup> To work an equitable conversion by contract it is necessary that the contract be valid and binding, and such as a court will specifically enforce against an unwilling purchaser.<sup>6</sup>

Since this is true it seems clear that the equitable conversion is due not to the "presumed intention" of the parties to the contract, but to operation of law; if equity will decree specific performance an equitable conversion occurs; if such a decree is impossible there can be no conversion. Maxims are seldom a reason, but only an excuse. To say that a purchaser having a specifically enforceable contract right to obtain land at a future date upon paying the purchase price is the immediate owner because "equity regards as done what ought to be done" is in effect saying that two things entirely different are the same thing. "Only the hoary age and frequent repetition of the maxim prevents a general recognition of its absurdity—and one who accepts the maxim denies himself the effort of further thought."

Some cases treat the vendor as holding the land in trust for the purchaser, and the purchaser as trustee of the purchase-money for the vendor.<sup>8</sup> There are several reasons why the vendor-purchaser relationship is not properly analogous to the trustee situation. A trustee is not entitled to profit by his position.<sup>9</sup> Therefore, the vendor is not a trustee as to the legal title for the purchaser, for he is entitled to the rents and profits while he is in possession which is usually until the date of conveyance.<sup>10</sup> The vendor holds the legal title as security for the purchase price.<sup>11</sup> If the vendor insures the property he is allowed

<sup>5</sup> *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 480, 97 N. E. 43, 46 (1911).

<sup>6</sup> *Flomerfelt v. Siglin*, 155 Ala. 633, 47 So. 106 (1908); *Rodish v. Moore*, 266 Ill. 106, 107 N. E. 108 (1914); *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495 (1886); *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704 (1890); *In re Thomas*, L. R. 34 Ch. D. 166 (1886); *Lysaght v. Edwards*, L. R. 2 Ch. D. 499 (1876); *Buckmaster v. Harrop*, 7 Ves. Jr. 341 (1802); *In re Bernhard*, 134 Iowa 603, 112 N. W. 86 (1907).

<sup>7</sup> 2 Williston on Contracts, Sec. 929, p. 1767.

<sup>8</sup> *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495 (1886); *House v. Jackson*, 24 Ore. 89, 32 Pac. 1027 (1893); *Pollexfen v. Moore*, 3 Atk. 272 (1745); *Green v. Smith*, 1 Atk. 572 (1738).

<sup>9</sup> *Richardson's Admrs. v. Spencer*, 57 Ky. (18 B. Mon.) 450 (1857); *Arnold v. Brown*, 24 Pick. (Mass.) 89, 35 Am. Dec. 296 (1832).

<sup>10</sup> *Townley v. Bedwell*, 14 Ves. Jr. 591 (1808); *Lumsden v. Fraser*, 12 Sim. 263 (1841).

<sup>11</sup> *Foster v. Deacon*, 3 Madd. 394 (1818); *Carrodus v. Sharp*, 20 Beav. 56 (1855); *Clarke v. Ramuz*, L. R. 2 Q. B. 456 (1891).

to hold the proceeds for his own benefit.<sup>12</sup> The vendor has too many beneficial interests to be a trustee. The purchaser is said to be the trustee of the purchase-money; yet he does not hold any specific property for the vendor. In fact, the purchaser is a mere debtor with his sole obligation in law and equity being to pay the purchase-money when the vendor conveys the legal title, in the case of the usual contract. In 1738 when Lord Hardwicke said that "the vendor is from the time of the contract, considered as trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor,"<sup>13</sup> it was the law of England that the promises in all bilateral contracts, in the absence of express conditions, were independent.<sup>14</sup> Then, the vendor's obligation in law, as well as in equity was absolute, and it was his duty to convey to the purchaser whether the purchase-money was paid or not. Under such a state of law, a vendor in possession was more nearly a trustee, even though he was entitled to the rents and profits, than he is today when the promises in bilateral contracts are mutually dependent, even in the absence of express conditions, which has been the law ever since Lord Mansfield's decision in *Kingston v. Preston*,<sup>15</sup> handed down some thirty-five years after Lord Hardwicke's decision. If implied conditions had been a part of the English law at an earlier date it is doubtful if the equity doctrine would ever have arisen. At least, this is a striking example of the common habit, indulged in by many courts, of following precedents when the reason for the rule no longer exists. Some cases have recognized the incongruity in the analogy to the trustee relationship.<sup>16</sup> The relationship between a vendor and purchaser has also been called that of a mortgagee-mortgagor.<sup>17</sup> In at least two important particulars this analogy is not sound. A vendor is allowed to make time of the essence of the contract; he may even do this at a subsequent time if he gives reasonable notice to the purchaser, and such conditions will generally be enforced by a court of equity if forfeitures and other inequitable results are avoided.<sup>18</sup> But in mortgage law no agreement between the mortgagor and the mortgagee for non-payment on time will be enforced.<sup>19</sup> There is one qualification of this principle

<sup>12</sup> *Rayner v. Preston*, L. R. 18 Ch. D. 1 (1881); *Wood v. Insurance Co.*, 46 N. Y. 421 (1871). *Contra*: *Phinzy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900); *Skinner, etc. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900).

<sup>13</sup> *Green v. Smith*, 1 Atk. 572 (1738).

<sup>14</sup> *Pordage v. Cole*, 1 Wms. Saunders 319 (1669).

<sup>15</sup> 2 Doug. 689, S. C. Lofft 194 (1773).

<sup>16</sup> *Rayner v. Preston*, L. R. 18 Ch. D. 1, 6 (1881), per Cotton L. J. and per Brett, L. J., L. R. 18 Ch. D. 1, 10 (1881).

<sup>17</sup> *Lowery v. Patterson*, 75 Ala. 109, 111 (1883); *Straus v. White*, 66 Ark. 167, 170, 51 S. W. 64, 65 (1899); *Stevenson v. Loehn*, 57 Ill. 609, 511 (1871).

<sup>18</sup> *Kirby v. Harrison*, 2 Ohio State 326, 59 Am. Dec. 677 (1853), and cases cited therein.

<sup>19</sup> *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775 (1877); *Fields v. Helms*, 82 Ala. 449, 3 So. 106 (1887); *Marshall v. Thompson*, 39 Minn. 137, 39 N. W. 309 (1888).

in the law of vendor and purchaser where the purchaser is in possession, but only in such cases.<sup>20</sup> A purchaser is not entitled to possession unless the contract expressly gives him such a right.<sup>21</sup> And a purchaser is not entitled to the rents and profits until he is entitled to possession,<sup>22</sup> although he is entitled to them thereafter.<sup>23</sup>

The problem is to explain the result reached in the so-called "equitable conversion" cases using other principles which are sound.<sup>24</sup> When an ordinary bilateral contract for the sale and purchase of land is made, which is specifically enforceable in a court of equity, certain rights and obligations arise. The vendor has two contract rights; one is to sue the purchaser at common law for breach of contract if he refuses to perform; the other is to compel the purchaser to pay the purchase-money and receive a conveyance of the land.<sup>25</sup> The vendor also has an equitable right to hold the legal title as security for the purchase-money. His obligation is to convey the land when the purchase-money has been paid. The purchaser's sole obligation is to pay the purchase-money when the land is conveyed. He, too, has two contract rights; one to sue at common-law for breach if the vendor refuses to perform; the other a specifically enforceable right to obtain a conveyance upon paying the purchase-money,<sup>26</sup> which is a specific property right.<sup>27</sup> Since the purchaser does have this specific property right in equity he can obtain a conveyance from a subsequent pur-

<sup>20</sup> 2 Williston on Contracts, Sec. 937, p. 1780.

<sup>21</sup> Clarke v. Ramuz, L. R. 2. Q. B. 456, 463 (1891); Gaven v. Hagen, 15 Cal. 208 (1860); Williams v. Forbes, 47 Ill. 148 (1868).

<sup>22</sup> Rayner v. Preston, L. R. 18 Ch. D. 1, 11 (1881); Tucker v. McLaughlin-Farrar Co., 36 Okla. 321, 129 Pac. 5 (1912), and cases note 21.

<sup>23</sup> Buck v. Duvall, 11 Ga. App. 853, 76 N. E. 1053 (1912); Mason v. Chambers, 19 Ky. (3 T. B. Mon.) 318 (1826); Baxter v. Brand, 36 Ky. (6 Dana) 296 (1838).

<sup>24</sup> Stone, *Equitable Conversion by Contract* (1913), 13 Col. L. R. 369.

<sup>25</sup> Cathcart v. Robinson, 5 Pet. 264, 8 U. S. (L. Ed.) 120 (1831); Morgan v. Eastman, 59 Fla. 562, 52 So. 305 (1910); Jones v. Newhall, 115 Mass. 244 (1874).

<sup>26</sup> Jones v. Newhall, 115 Mass. 244 (1874).

<sup>27</sup> "Juridical rights are all deductions from juridical remedies; hence, as soon as it became settled that a purchaser could get the *remedy* of specific performance of a contract to convey land, the inference or deduction was that there was already a specifically enforceable *right* to the property which was the basis for his suit. Before a *remedy* is once given in any particular class of cases there may be an interest which should be protected, but no *right* can be said to arise until such protection is given. After the remedy is once given we infer the existence of a right before the suit was brought; and if the decision is acquiesced in as representing the probable future action of the courts in such cases, the right in similar cases is then thought of as existing before any remedy is even sought. Where a right is given by statute the inference above indicated is unnecessary." Clark, *Principles of Equity*, Sec. 83, n. 1.

chaser with notice from the vendor,<sup>20</sup> or a donee without notice.<sup>21</sup> But before the contract is performed the vendor dies. Since the legal ownership of a contract is personal property it passes to the vendor's personal representative vesting in him the rights of the vendor. The land will devolve upon the heir of the vendor, but the heir takes the land subject to the purchaser's specific property right, because he is in the exact position of a donee. The legal title is now in the heir but this he holds subject to the personal representative's equitable right to have it held as security for the purchase-money as an incident to the personal claim which the personal representative holds.<sup>22</sup>

The personal representative could not bring a suit at law for breach against the purchaser for, with the land and the legal title held by the heir, he cannot show the ability and willingness to convey on his own part necessary to put the purchaser in default. The only remedy is to bring a bill in equity for specific performance naming the purchaser as defendant, and the vendor's heir as co-defendant. All three are necessary parties. The personal representative having the rights of the vendor is the person entitled to receive the purchase-money;<sup>23</sup> he is the only person who can give a receipt for the money and release his right to have the legal title held as security for the purchase-money. The purchaser because he is the person obligated to pay the purchase-money and the one having the right to receive the conveyance. The heir<sup>24</sup> because he is the party holding the legal title and the land and must convey it because he is in the position of a donee. When the specific performance is decreed the purchaser will receive the land conveyed to him by the heir in return for the purchase-money paid to the legal representative. The result will be the same if the purchaser is the party seeking specific performance of the contract.

The result is reached because the court of equity actually decrees specific performance of the contract and not because of the application of a legal fiction. The most that can be said for the doctrine of equitable conversion is that it is a result and not a cause.

JOHN GEYER.

---

<sup>20</sup> *Chicago Co. v. Hay*, 119 Ill. 507, 10 N. E. 34 (1887); *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544 (1888); *Page v. Martin*, 45 N. J. Eq. 585, 20 Atl. 46 (1890).

<sup>21</sup> *Martin v. Seemore*, 1 Ch. Cas. 170 (1670); *Caborn v. Godfrey*, 3 Desaus (S. C. Eq.) 514 (1813); *McCullom v. Mackrell*, 13 S. Dak. 262, 83 N. W. 255 (1900).

<sup>22</sup> This is exactly like the right of an assignee of a claim secured by a mortgage although it was not assigned. *Danser v. Warwick*, 33 N. J. Eq. 133 (1880).

<sup>23</sup> *Roberts v. Marchant*, 1 Phillip 370 (1843); *Townsend v. Champ-erone*, 9 Price 130 (1821).

<sup>24</sup> *Roberts v. Marchant*, 1 Phillip 370 (1843).